Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

No. 92-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

FIRST GIBRALTAR BANK, F.S.B.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit properly concluded that Petitioner was not a depositor of First Texas whose liability First Gibraltar assumed when deposit records were silent as to the existence of any deposit from Petitioner and when the Acquisition Agreement between First Gibraltar and the FSLIC only provided for the assumption of specific liabilities, which did not include any claim of Petitioner.

2. Whether granting a Petition for Writ of Certiorari is appropriate when the Opinion below turns on a case-specific set of facts which was tied to a particular Acquisition Agreement and a particular inventory list of assumed deposits.

3. Whether granting a Petition for Writ of Certiorari is appropriate when federal authority regarding deposit insurance, including this Court's Opinion in *FDIC v. Philadelphia Gear,* supports the Fifth Circuit Opinion.

4. Whether granting a Petition for Writ of Certiorari is appropriate when this case falls squarely within the *D'Oench, Duhme* doctrine because Petitioner seeks to rely on verbal understandings which were not documented in the bank deposit account records at the time the FSLIC placed First Texas into receivership.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent First Gibraltar Bank, F.S.B.[1] ("First Gibraltar") respectfully requests that the Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 17, 1992. The Opinion below is reported at 963 F.2d 79.

[1] Pursuant to Supreme Court Rule 29.1, First Gibraltar Bank, F.S.B. advises the Court that First Gibraltar is a federal savings bank organized under the laws of the United States. Its parent company, First Gibraltar Holdings, Inc., is a closely held corporation, which is not publicly traded. First Gibraltar Bank, F.S.B. has over one hundred wholly-owned subsidiaries, not one of which is publicly traded. Respondent will provide additional details if needed or required by the Court.

COUNTERSTATEMENT OF THE CASE

On May 16, 1985, First Texas Savings Association ("First Texas") loaned Shady Valley West Joint Venture ("Shady Valley") $29,620,000.00 to acquire and develop property located in Arlington, Texas (the "Property"). [ROA V 4, P 882]. As partial security for the loan, Shady Valley agreed to provide a $4.1 million letter of credit to First Texas. [ROA V 4, P 883]. The letter of credit agreement provided in part as follows:

> First Texas has required that Shady Valley procure, *for the benefit of First Texas*, an irrevocable standby letter of credit in the amount of Four Million One Hundred Thousand and No/100 Dollars ($4,100,000.00) (the "Letter of Credit"), which is to be procured for the purpose of assuring First Texas that funds are and will be available for the construction of the said proposed Green Oaks Boulevard through the Property.

[ROA V 4, P 884] (emphasis supplied). On May 16, 1985, Shady Valley obtained letter of credit 856 at First City National Bank of Arlington for the benefit of First Texas. [ROA V 4, P 883].

On June 3, 1986, Shady Valley and First Texas entered into a letter agreement (the "June 3 Letter Agreement") which provided in pertinent part as follows:

> Reference is hereby made to the Loan issued by Lender to Borrower and payable at the interest rate, in accordance with, and subject to the terms, provisions and conditions contained therein, including without limitation, the retention by Lender of that one certain Letter of Credit No. 856 issued by First City National Bank of Arlington in the original face amount of $4,100,000.00 ("Letter of Credit") . . . . Notwithstanding anything contained in the Note or in any of the other loan documents executed in connection with the Loan, or in any amendments or modifications thereto, this letter shall serve as an acknowledgment and agreement by and between the undersigned parties as to the

following modifications, effective as of the date shown above:

* * *

(3) Upon full execution hereof, Lender will submit a draw in accordance with the terms of the Letter of Credit in the sum of $2,697,993.70. Said sum to be applied and/or disbursed by Lender in the following manner:

(a) an amount equal to $297,993.70 shall be immediately applied by Lender for payment of the May accrued and unpaid interest on the Note;

(b) an amount equal to $100,000.00 shall be held by Lender to be disbursed to Ronald C. Finley, W. James Conrad, J. Charles Powell and William J. Shepherd, Jr., . . . upon . . . payment by Borrower . . . of the property taxes relating to the Property; and

(c) An amount equal to $2,300,000.00 shall be held by Lender for the construction costs relating to Green Oaks Boulevard, said funds to be disbursed to Borrower in accordance with the terms and conditions provided in the Loan . . . .

* * *

(6) This agreement shall incorporate all other terms and conditions of the Loan and the loan documents executed in connection therewith by and between Borrower and Lender.

[ROA V 4, P 884-85].

On June 6, 1986, First Texas drew against the letter of credit in the amount of $2,697,993.70, and First City National Bank of Arlington wired that amount to First Texas. [ROA V 4, P 886]. The $2,697,993.70 was then deposited in First Texas Money Maker Plus Account No. 30-891-665-3 (the "Account"). [ROA V 4, P 886]. The Account, including the signature card, was styled "FTSA Tr for Shady Valley J.V." First Texas was the

account holder, acting as trustee for Shady Valley, the beneficiary. [ROA V 4, P 886].

On September 26, 1986, First Texas and Shady Valley entered into an agreement modifying certain terms and provisions of the loan. [ROA V 4, P 887, 1000]. The modification agreement expressly provided that Account No. 308916653 was "currently held by Lender . . . as security in respect for [sic] the Loan." [ROA V 4, P 887, 1000].

On September 29, 1986, Joe Melton, a First Texas officer, signed the letter agreement upon which Petitioner has based its claims in this case (the "Escrow Letter Agreement"). [ROA V 4, P 887]. The Escrow Letter Agreement provided that First Texas would set up an account designated "Escrow Account-Arlington" and that the monies in such account would be used to build the road. The Escrow Letter Agreement also provided that Petitioner may hire, but shall never be required to hire, a contractor to complete the work if Shady Valley failed to commence construction timely. [ROA V 4, P 887]. *The Escrow Letter Agreement was maintained by First Texas in its real estate loan credit files and was not part of the First Texas deposit account records.* [ROA V 4, P 887; ROA V 4, P 879].

First Texas did not set up or establish an account designated "Escrow Account-Arlington" naming Petitioner as a depositor. [ROA V 3, P 836-43]. The Account, previously established on or about June 6, 1986, was not restyled or redesignated and pursuant to the applicable loan documents between First Texas and Shady Valley, remained security for the loan. [ROA V 4, P 887-88]. Petitioner never deposited any money in any account at First Texas. [ROA V 4, P 887; ROA V 3, P 879]. At or about the time that Petitioner executed the Escrow Letter Agreement, Jay Doegey, the Petitioner's attorney, called a First Texas loan officer and was told that the account contemplated by the Escrow Letter Agreement had, in fact, been established and funded. [ROA V 3, P 663].

Thereafter, Shady Valley defaulted on its loan repayment obligations to First Texas. In addition, by failing to commence construction of the road, Shady Valley breached the Escrow Letter Agreement within one month after its execution. [ROA V 4, P 888]. Petitioner never commenced construction of the road, nor did it notify First Texas of its desire to do so. [ROA V 4, P 888].

On April 13, 1987, First Texas notified Shady Valley that the loan was in default. [ROA V 4, P 888]. On April 16, 1987, the Account was offset, closed by First Texas and all amounts therein (at that time $2,537,956.60) were applied to Shady Valley's indebtedness under the loan as an offset. [ROA V 4, P 888]. After April 16, 1987, the Account no longer existed, and therefore, there was no money on deposit in the Account at First Texas. [ROA V 4, P 889].

On or about May 7, 1987, Jay Doegey, attorney for Petitioner, sent a demand letter to First Texas which stated as follows:

> [First Texas is] in breach of its escrow agreement . . . by which First Texas . . . is to act as escrow agent in accordance with the agreement . . . . You are hereby notified that First Texas Savings Association is in breach of such agreement, that such breach constitutes a breach of contract, breach of fiduciary duty, interferes with the business relationship of the City of Arlington and Shady Valley West Joint Venture and may constitute a conversion . . . .

[ROA V 4, P 889-90]. On May 27, 1987, Petitioner sued First Texas in state court asserting tort and breach of contract claims. [ROA V 4, P 889-90]. Conspicuously absent from Petitioner's demand letter and from the original state court petition was any claim that Petitioner was a "depositor" of First Texas.

On December 27, 1988, First Texas was declared insolvent and the Federal Savings & Loan Insurance Corporation (the "FSLIC") was appointed as receiver. [ROA V 1, P 209]. The next

day, First Gibraltar and the FSLIC entered into an Acquisition Agreement whereby First Gibraltar purchased substantially all of the assets and certain limited liabilities of First Texas and other insolvent thrifts. [ROA V 1, P 209]. In appointing the FSLIC as receiver of First Texas, the Federal Home Loan Bank Board determined that the assets of First Texas were insufficient to satisfy its liabilities and that no money was available to pay general unsecured claims against the defunct thrift. [ROA V 1, P 104-11].

Only after First Texas was declared insolvent and after Petitioner realized its general unsecured claims could only be asserted against the FSLIC as receiver of First Texas did Petitioner allege that it had been a "depositor" and that First Gibraltar assumed a "deposit liability" to Petitioner. Because the Account had been offset and closed in April 1987, it was not listed as a deposit liability on the books and records of First Texas on the date of insolvency. [ROA V 4, P 890; ROA V 6, P 1421]. Moreover, the deposit account records of First Texas conclusively establish that Petitioner never deposited any money in the Account. [ROA V 3, P 836-843]. First Gibraltar did not assume or agree to pay the claims that are being asserted by Petitioner in this case. [ROA V 1, P 209].

The Fifth Circuit fully considered all of the facts and issues before it and correctly decided that Petitioner was not a depositor of First Texas whose liability First Gibraltar agreed to assume.

SUMMARY OF REASONS FOR DENYING THE WRIT

The decision of the Fifth Circuit is correct. The issues in this case do not present any reasons which justify review by this Court. Indeed, the Fifth Circuit Opinion is fact specific and turns on the particular Acquisition Agreement and inventory list of assumed liabilities at issue in the case. Additionally, the decision of the Fifth Circuit is in accordance with banking regulations and

with long standing federal authority interpreting those regulations. Finally, there is no genuine conflict among the United States Courts of Appeals over the alleged "questions" raised by the petition.

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW RESOLVED A FACT SPECIFIC CONTRACTUAL MATTER WHICH DOES NOT UNDERMINE THE ENTIRE DEPOSIT INSURANCE SCHEME

The decision below resolved a fact specific contractual matter which, contrary to the melodramatic entreaties of Petitioner, does not undermine this Nation's deposit insurance scheme. A claim for deposit insurance is not at issue in this appeal and was certainly not a basis for the Fifth Circuit Opinion. This is not a case against the FDIC, the FSLIC or any other deposit insurer;[2] rather, this case involves nothing more than determining whether First Gibraltar, as the acquiring institution, assumed a specific liability not listed on the FSLIC inventory list of assumed liabilities. After analyzing the Acquisition Agreement governing First Gibraltar's assumption of liabilities, the Fifth Circuit properly concluded that First Gibraltar did not assume liability for Petitioner's claims.

Not surprisingly, in its petition for writ of certiorari, Petitioner has wholly failed to address the Acquisition Agreement between First Gibraltar and the FSLIC. This is because the Acquisition Agreement is clear and unambiguous that First Gibraltar assumed only limited liabilities. For example, the Acquisition Agreement states that First Gibraltar agreed only to

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[2] The district court dismissed Petitioner's claims against the FDIC-receiver and the FDIC-corporate with prejudice and that ruling was not appealed.

assume liabilities to "Depositors with respect to their Deposits . . . " and only those deposits in existence on December 27, 1988, the date of the receivership. [ROA V 1, P 231]. The Acquisition Agreement specifically defines "Deposit" as follows:

> The term "Deposit" means a *withdrawable* or repurchasable share, investment certificate on deposit in the Closed Association [First Texas] of a type that *is* (or would be, but for the $100,000.00 limitation) insurable under Section 405(a) of the National Housing Act (12 U.S.C. §1728(a) (1982)) including, without limitation, all uncollected items included in the *depositors' balances and credited on the books of the Closed Association* . . . .

[ROA V 1, P 226] (emphasis supplied). The use of the present tense (*i.e.*, a "*withdrawable*" deposit that "*is*" insurable) and the use of references to "*depositors' balances*" that are "*credited on the books*" clearly establish that First Gibraltar assumed only deposits on the books and records of First Texas as of December 27, 1988. This conclusion is buttressed by Section 5 of the Acquisition Agreement, which provides in part that:

> The receiver shall furnish to the acquiring Association upon its completion a copy of the inventory and *a record of the Closed Association's secured, deposit, and tax claim liabilities that were assumed pursuant to this Agreement.*

[ROA V 1, P 489] (emphasis supplied). The fact that the Acquisition Agreement calls for a "record" of "deposit . . . liabilities that were assumed" necessarily presupposes the existence of a fixed, ascertainable, and limited number and amount of assumed deposit liabilities.

The Shady Valley Account, the Account upon which Petitioner makes its claims, was not a deposit credited on the books of First Texas on December 27, 1988, at the time of the First Texas insolvency. The Account was not listed as an assumed deposit liability on the inventory of deposit liabilities received by

First Gibraltar pursuant to Section 5 of the Acquisition Agreement. [ROA V 6, P 1421]. At the time of the First Texas insolvency, Petitioner was simply an unsecured creditor seeking to collect damages for alleged breach of contract and tort claims from First Texas in a state court action. Petitioner had no judgment or other security and did not even claim to be a depositor of First Texas.

Moreover, the inventory of assets and liabilities consisted of a list contained in an Ernst & Young December 27, 1988 Statement of Financial Condition of First Texas and supported by detailed records such as the First Texas DDA (demand deposit accounts) trial balance and general ledger. [ROA V 6, P 1421]. The DDA trial balance contained a listing of deposit accounts which were assumed by First Gibraltar pursuant to Section 3 of the Acquisition Agreement, and such accounts were listed in numerical order. [ROA V 6, P 1421]. The Account at issue in this case is *not* listed as one of the deposit liabilities assumed by First Gibraltar, [ROA V 6, P 1421, 1432], and Petitioner never challenged the inventory list. *City of Arlington, Texas v. FDIC*, 963 F.2d 79, 84 (5th Cir. 1992). Because the Account was not listed on the inventory of assumed deposit liabilities on the date of insolvency, First Gibraltar did not receive any payments from the FSLIC representing any money related to the disputed Account. *Id.* at 82.

The Acquisition Agreement governed the entire transaction between the FSLIC and First Gibraltar. The Agreement is clear that First Gibraltar did not assume any liability to Petitioner. Petitioner's claim that First Gibraltar is obligated to assume its general unsecured claim against First Texas is contrary to the plain terms of the Agreement. *First Gibraltar is not First Texas.* First Gibraltar is a separate and independent entity that entered into a contract with the FSLIC as receiver of First Texas to acquire certain assets and limited liabilities. Petitioner's general unsecured claim against First Texas was not among the limited liabilities assumed by First Gibraltar. Despite Petitioner's wishful thinking, it is well-established that claims for

unassumed liabilities cannot be asserted against an acquiring bank. *Gulley v. Sunbelt Savings, F.S.B.*, 902 F.2d 348, 350-51 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 673 (1991); *FSLIC v. Locke*, 718 F. Supp. 573, 580 (W.D. Tex. 1989) (neither the FSLIC Corporate nor the acquiror can be held liable for obligations they have not assumed). The Fifth Circuit properly resolved this dispute by analyzing the plain terms of the Acquisition Agreement entered into between the FSLIC and First Gibraltar and by concluding therefrom that First Gibraltar never agreed to assume Petitioner's claims. The Fifth Circuit Opinion clearly turns on a case-specific set of facts, does not undermine the federal deposit insurance system and does not require intervention from the highest court in the country.

II.

THE FIFTH CIRCUIT OPINION IS CONSISTENT WITH FEDERAL AUTHORITY REGARDING DEPOSITOR STATUS

For more than fifty years, courts have uniformly concluded that deposit account records are conclusive of the existence of a deposit. The deposit account records of First Texas conclusively establish that Petitioner was never a depositor of First Texas. [ROA V 3, P 836-43]. The record on appeal demonstrates that Petitioner never had a deposit account at First Texas and was certainly not a depositor of First Texas on the date of its insolvency. [ROA V 3, P 836-43].

Sound policy justifications underlie the requirement of the conclusiveness of deposit account records. Deposit insurance coverage determinations are necessarily and literally made overnight in order to conclude purchase and assumption transactions with minimal disruption to the insolvent institution's customers. *Abdulla Fouad & Sons v. FDIC*, 898 F.2d 482, 485 (5th Cir. 1990). The conclusiveness of account records facilitates the speedy transition of deposits, which is essential to make the public's insured savings available as soon as possible and which insures

that accounts are not frozen indefinitely while detailed investigations as to the actual ownership of each account are carried out. *Id.* Account records also must be conclusive to prevent "creation" of trust accounts and agency relationships subsequent to an institution's insolvency that might fraudulently increase insurance coverage. *Id.; accord Baskes v. FSLIC*, 649 F. Supp. 1358, 1360 (N.D. Ill. 1986) (policy reasons dictate that account records must be conclusive). Furthermore, federal banking regulatory agencies are required by statute to compare the cost of liquidating failed institutions with the cost of entering into purchase and assumption transactions. 12 U.S.C. §1823(c)(4)(A) (1989). If alleged wrongful offsets or undisclosed relationships could create insurable deposits or if they could be transferred to an acquiring institution in a purchase and assumption transaction, liquidation costs would be uncertain and the statutory objective of identifying the least costly disposition of failed financial institutions would be frustrated. *See Nimon v. Resolution Trust Corporation*, 1992 WL 252780 *7 (5th Cir. Oct. 21, 1992) ("[t]he deposit insurance agencies have a recognized need to rely upon the ownership rights and capacities reflected by an institution's deposit account records when an institution is placed into receivership .... [t]o require [them] to rely on extrinsic evidence would undermine the ability to rely on those records."). Contrary to Petitioner's emotional claims that the decision below departs from policy and precedent, the Fifth Circuit Opinion is entirely consistent with the policy justifications for the conclusiveness of account records, as well as with legal precedent.

No court has authorized an exception to the well-established rule regarding the conclusiveness of account records in a case such as the one before the Court. Petitioner's request for a writ of certiorari on an issue which has been clearly and plainly resolved and about which courts have no dispute should be denied.

A. Federal Case Law Confirms That Account Records Are Conclusive

Federal authority has established that deposit records are conclusive of depositor status. For example, the Fifth Circuit's ruling in *Abdulla Fouad*, 898 F.2d at 483, confirms this principle and supports the decision of the lower court. In *Abdulla Fouad*, the alleged "depositor," like Petitioner, claimed an interest in certain deposited funds despite the fact that the account signature card did not reflect the beneficial interest asserted. Also like Petitioner in this case, Fouad claimed that the FDIC and the courts should look beyond the deposit account records to documents in the credit file and to the knowledge of an officer of the failed bank. *Id.* at 484.

In affirming summary judgment for the FDIC, the court rejected Fouad's attempt to go beyond the clear and unambiguous signature card and held:

> Fouad seeks to go beyond the bank's deposit account records and require FDIC to research the bank's credit files and perhaps other records before it may deny a claim. This position contradicts, rather than supplements, both 12 U.S.C. §1822(c) and 12 C.F.R. §330.1.

Id. at 485. The FDIC regulation construed in *Abdulla Fouad* is virtually identical to the FSLIC regulation that was in existence at the time First Texas failed. *Compare* 12 C.F.R. §330.1 (1987) *with* 12 C.F.R. §564.2 (1988).

The Fifth Circuit's decision in *Spawn v. Western Bank-Westheimer*, 925 F.2d 885 (5th Cir. 1991), also confirms the conclusiveness of account records and supports the decision below. In *Spawn*, the Fifth Circuit recognized the general rule that account records are dispositive:

> If the agency relationship does not appear *in the deposit records*, the claimant goes away empty handed. *See Abdulla Fouad & Sons v. FDIC*, 898 F.2d 482 (5th Cir. 1990). Or, a claimant may assert that the named depositor was acting as trustee for the claimant. Again, if no

> trust relationship is mentioned *in the deposit records*, the claimant receives no coverage.

925 F.2d at 888 (emphasis supplied). The principle articulated in *Spawn* is no less valid in this case.

The Fifth Circuit has recently reaffirmed this principle in *Nimon*, 1992 WL 252780. In *Nimon*, Mr. and Mrs. Nimon urged that they were each entitled to separate deposit insurance because the funds in question were actually owned by them in a joint tenant capacity, despite the fact that the joint tenancy was not reflected on the deposit account records. The Fifth Circuit rejected Petitioners' claim for the additional insurance "because [where, as here,] the account records are clear and unambiguous, their statement of the capacity in which funds are owned is conclusive." *Nimon*, 1992 WL 252780 *4. In explaining its holding, the court stated, *inter alia,* that the "RTC cannot be bound either by [the bank's] alleged failure to inform all employees of the Nimon's standing instructions, nor by Mr. Nimon's mistaken assumptions." *Id.* The same reasoning holds true here; a deposit liability cannot be deemed into existence by either the alleged wrongful acts of a First Texas employee or by Petitioner's mistaken assumptions.

Petitioner's efforts to persuade this Court that the Fifth Circuit Opinion is at odds with *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986), are belied by the facts and the holdings of both cases. In the first instance, *Philadelphia Gear* is factually distinguishable from the case before this Court because *Philadelphia Gear* is a case against the FDIC for the collection of deposit insurance. This case, on the other hand, is not a case against the insurer; rather, it is a contract case against the acquiring institution, First Gibraltar.

Even if, however, *Philadelphia Gear* and the Opinion below are construed to be factually similar, the Fifth Circuit has not undermined or created conflict with the holding in *Philadelphia Gear* because both cases reached the same result. In *Philadelphia Gear*, this Court concluded that Philadelphia Gear was not a

"depositor" and could not obtain deposit insurance because it "surrendered absolutely nothing to the bank." 476 U.S. at 435. Similarly, here, the Fifth Circuit concluded that Petitioner was not a "depositor" of First Texas whose liability First Gibraltar (the acquiring institution) assumed because Petitioner surrendered absolutely nothing to a bank, having made no "actual deposit of money . . . to an account." *City of Arlington*, 963 F.2d at 82 & n.7. Indeed, Petitioner has even conceded that it never deposited money with First Texas. [ROA V 3, P 750]. In short, the Fifth Circuit correctly held, in accordance with this Court's teachings in *Philadelphia Gear*, that Petitioner did not have a deposit with First Texas and was not a depositor of First Texas. *See Philadelphia Gear*, 476 U.S. at 435.[3]

Petitioner's attempt to create the illusion of a conflict between the Fifth Circuit and *Philadelphia Gear* is inaccurate and misleading. Petitioner argues that the "suggested" outcome of a potential fact scenario "alluded to" (but not found) in *Philadelphia Gear* makes the Fifth Circuit Opinion insupportable. Petition at 13. To that end, Petitioner would have this Court "read into" *Philadelphia Gear* the unprecedented proposition that if "hard assets" were entrusted to the bank at anytime by anyone, a deposit exists, whether *vel non* that "deposit" is evidenced by account records. *Id.* Not only is this argument an untenable departure from the true holding in *Philadelphia Gear*, but it is also illogical in the face of the Nation's entire deposit insurance scheme. When addressing a similar argument made by Petitioner, the Fifth Circuit appropriately rejected this expansive reading of the nature of "deposit liability," stating:

> Taken to its logical conclusion, Arlington's theory would have Gibraltar assume liability for every depositor account transaction made by First Texas, including those which resulted in the closure and deactivation of

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[3] Importantly, the "hard assets" analysis is not the only or even the primary rationale for the decision of the Fifth Circuit. As stated *supra*, the Fifth Circuit carefully and properly analyzed the Acquisition Agreement to determine whether Petitioner was a depositor.

> deposit accounts . . . . Apparently Arlington considers the FSLIC inventory of deposit accounts provided to Gibraltar under the purchase and assumption agreement to be merely the baseline depositor liability that Gibraltar assumed; other "depositor" liabilities, such as Arlington's, would become exigible *seriatim* upon discovery.

City of Arlington, 963 F.2d at 83. *Philadelphia Gear* does not purport to change the fundamental premise of the Nation's banking insurance scheme, which requires demonstrable evidence of depositor status through account records. *See, e.g., Abdulla Fouad,* 898 F.2d at 485; *Spawn*, 925 F.2d at 889; *Nimon*, 1992 WL 252780 *4.

The Fifth Circuit appropriately concluded that Petitioner was not a depositor of First Texas whose liability First Gibraltar subsequently assumed because, *inter alia*, Petitioner's "ownership of the funds in the Account was never noted upon the deposit records of First Texas[.]" *City of Arlington*, 963 F.2d at 82. Petitioner would have this Court interpret *Philadelphia Gear* to abolish more than fifty years of evolving case law and regulations, all of which confirm the conclusiveness of deposit account records. *Philadelphia Gear* does not address, much less permit, a third party to look beyond the bank deposit account records. This Court should not disregard a well-established body of law regarding the conclusiveness of deposit account records based upon Petitioner's wishful, but erroneous interpretation of *Philadelphia Gear*.

In a further attempt to persuade this Court that some conflict of authority may exist, Petitioner resorts to reliance upon a series of depression-era cases that are so factually distinguishable as to cut against Petitioner's argument. As the Fifth Circuit correctly concluded, the depression-era cases are inapposite because "[e]ach involves a suit against the FDIC for insurance payments and turn [sic] on factual circumstances in which an actual deposit of money was made to an account and both the deposit and the account were clearly documented in the bank

records." *City of Arlington*, 963 F.2d at 82. Indeed, in each of these cases, deposits were found to exist only when the claims were supported by deposit account records; *the court in each case required proof that the claimant had "done all that he could do" to confirm that he was a depositor in good standing. See FDIC v. Records*, 34 F. Supp. 600 (W.D. Mo. 1940) (entry of deposit in passbook by bank teller proved deposit); *see also FDIC v. Barton*, 106 F.2d 737, 738 (10th Cir. 1939), *aff'g, Barton v. Johnson*, 24 F. Supp. 987, 988 (W.D. Okla. 1938) (plaintiff's "deposit was actually entered upon books of the bank . . . ."); *FDIC v. Deaton*, 105 F.2d 677, 679 (10th Cir. 1939), *aff'g, Deaton v. FDIC*, 24 F. Supp. 984 (W.D. Okla. 1938) (plaintiff possessed certificate of deposit issued by bank that proved ownership of deposit); *Jones v. FDIC*, 24 F. Supp. 985, 986 (W.D. Okla. 1938) (records of the bank (ledgers) showed that plaintiff's deposit was made).

Contrary to the facts of each of the depression-era cases on which it relies, Petitioner cannot produce any evidence from the First Texas deposit account records to demonstrate that it was a depositor. In fact, unlike the depositors in each of the depression-era cases, *Petitioner by its own admission never tendered any funds to First Texas*. [ROA V 3, P 750]. To group Petitioner in the same category as the individuals in the depression-era cases who stood in teller lines, gave money to the teller at the window and received a credit in an account book is entirely unwarranted.

Each of the plaintiffs in these cases sought to ensure that he or she had a protectable deposit interest at the bank. Petitioner, to the contrary, negligently and recklessly failed to attempt to protect its interest. Indeed, it signed an Escrow Letter Agreement that did not specify any particular First Texas account. It relied on oral understandings and unrecorded agreements that its account was set up at the bank. It never requested any account documentation from the bank. It never signed a signature card. It never received account statements and never even inquired about them. This is totally at odds with Petitioner's claim that it is a "depositor."

Petitioner is a large municipal entity with sophisticated and professional management, familiar with banking customs and practices. Petitioner seeks to avoid the consequences of its own negligence by saddling First Gibraltar with a liability it did not assume and for which it received no money. As the Fifth Circuit correctly concluded, Petitioner's arguments turn equity on its head, "occasioning the very result which equity abhors — one person (Gibraltar) . . . paying the debts of another (First Texas) without having received any value whatever." *City of Arlington*, 963 F.2d at 82. The law simply does not permit such a shifting of liability; no court has ever held so, and thus, the petition for writ of certiorari should be denied.

Petitioner inaccurately attempts to manufacture a conflict in the circuits by citing *Jones v. FDIC*, 748 F.2d 1400 (10th Cir. 1984). Contrary to Petitioner's arguments, the *Jones* opinion is not in conflict with, and in fact supports, the decision of the Fifth Circuit. In *Jones*, the Tenth Circuit affirmed the summary judgment granted *in favor of the FDIC, which limited deposit insurance where, as here, the records of the bank did not reveal the executor's dual interest as trustee. See Jones*, 748 F.2d at 1405. Simply stated, the *Jones* court determined that account records were conclusive in precisely the same fashion as the Fifth Circuit. The *Jones* case is entirely consistent with other authority regarding the conclusiveness of account records.

Petitioner also erroneously cites *F.A.I.C. Securities, Inc. v. United States*, 595 F. Supp. 73, 77 (D.D.C. 1984), *aff'd*, 753 F.2d 166 (D.C. Cir. 1985), for the proposition that Petitioner was a "beneficial owner" of the Account despite the fact that such interest does not appear in the First Texas account records. However, *F.A.I.C.* is distinguishable and inapplicable to the case at bar. As the Fifth Circuit correctly concluded, *F.A.I.C.* involved only a challenge to the validity of regulations specifically governing "brokered deposits," and neither the district court nor the appellate court reached any conclusions regarding account ownership. *See City of Arlington*, 963 F.2d at 82. Moreover, the *F.A.I.C.* opinion does not purport to address the facts of the

present case in which Petitioner claims that it owned the deposit, despite the institution's account records to the contrary.

Petitioner further claims that *Anheuser-Busch Employees Credit Union v. FDIC*, 651 F. Supp. 718 (W.D. Mo. 1986), supports its position. However, in *Anheuser-Busch, summary judgment was granted for the FDIC*, and the district court determined that under the legislative history of the relevant banking statute, *it is not true* "that 'beneficial ownership,' no matter what the context, shall be the touchstone." *Anheuser-Busch*, 651 F. Supp. at 723, n.7. In fact, the result in *Anheuser-Busch* was that the court *refused* to look behind the deposit account records to find that credit union members were "depositors" of credit union deposits. *Id.* at 726. Neither *F.A.I.C.* nor *Anheuser-Busch* is inconsistent with the Fifth Circuit Opinion.

Contrary to Petitioner's pleas, in each case that has been decided since the FSLIC regulations were promulgated, including *Abdulla Fouad*, courts have relied upon account signature cards to determine whether any relationship supporting a claim for insurance coverage is evidenced in the deposit account records.[4] In this case, the only relationship disclosed in the deposit account records was that between First Texas and Shady Valley. No relationship involving Petitioner was disclosed on the deposit account records. Because the account records did not disclose any relationship with Petitioner, they are conclusive in precluding deposit insurance for Petitioner. *See Philadelphia Gear Corp. v. FDIC*, 751 F.2d 1131, 1138 (10th Cir. 1984) ("the records of the insolvent bank are conclusive as to the claimant's entitlement to deposit insurance"), *rev'd in favor of FDIC on other grounds*, 476 U.S. 426 (1986). The Fifth Circuit Opinion is consistent with these well-established principles.

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[4] *Accord Lambert v. FDIC*, 847 F.2d 604, 608 (9th Cir. 1988) (FDIC regulation "imposes an affirmative obligation to disclose one's status . . ." in the appropriate bank record. When no agency relationship is disclosed on the account signature card, the purported beneficiary has no interest in the deposit account); *Baskes v. FSLIC*, 649 F. Supp. 1358, 1361 (N.D. Ill. 1986).

B. Deposit Insurance Regulations Also Confirm The Conclusiveness of Account Records

The deposit insurance regulations also support the Fifth Circuit Opinion. Petitioner would have this Court retreat from the proper interpretation of the insurance regulations and hold that whenever any trust or fiduciary relationship appears on account records, those records are *not* conclusive and are subject to challenge by any person or entity using mere intent or "understandings." *See* Petition at 16. The regulations do not permit such challenges. *See, e.g.*, 12 C.F.R. §564.2(b) (1988). Rather, additional records (*i.e.*, records of the association or account holder) are used *only* to ascertain the details of a relationship already disclosed on the deposit account records.

Where, as here, legal identities and capacities are not disclosed on account records, no claim for insurance is recognized. The critical factor is the disclosure on account records of a relationship that may be entitled to additional insurance. Only then may details of the disclosed relationships — or the interests of other parties who are beneficiaries of the disclosed relationships — be ascertained using the association's or the account holder's records. Petitioner's claim fails this test.

Furthermore, the insurance regulations state that the amount of an insured deposit is "the amount which the insured member would have been entitled to withdraw as of the date of the default. . . ." 12 C.F.R. §564.1(b) (1988). Petitioner was not the insured member as reflected on the account records. Moreover, the Account was offset by First Texas against Shady Valley's indebtedness, and there was no insured deposit as of the date of the default.[5] It is well-settled that the FDIC (and the FSLIC) may rely on the "date of default" records. Consequently, Petitioner could not have withdrawn anything from the Account on the date of default and does not have an insured deposit as

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[5] The relationship of debtors and creditors to the insolvent institution is "cast in stone" at the time of closing. *FDIC v. McKnight*, 769 F.2d 658, 661 (10th Cir. 1985).

defined by the deposit insurance regulations. In sum, the deposit insurance regulations establish that deposit account records are the conclusive records for determination of account ownership. There is no ambiguity in the account records that would justify going beyond the account signature card. Petitioner's interpretation would allow undisclosed third parties to collaterally attack the conclusiveness of account records. Such a reading would permit a "free-for-all" of self-proclaimed "depositors" attacking the ownership of thousands of trust accounts which were transferred to acquiring institutions in purchase and assumption transactions.

The Fifth Circuit correctly held that Petitioner's theories, when taken to their logical conclusion, produce an absurd result. Petitioner would expose First Gibraltar and other acquiring institutions to unlimited liability for closed and deactivated deposit accounts even though the institution received nothing in return. *City of Arlington*, 963 F.2d at 83. Such a result is contrary to the plain terms of the Acquisition Agreement, federal case law and the deposit insurance regulations.

C. The Advisory Opinions Do Not Conflict With The Decision Below

Petitioner attempts to create a conflict between the Opinion below and two FDIC Advisory Opinions, Advisory Opinions 91-70 and 90-44. However, the Advisory Opinions do not provide Petitioner comfort. As is clear from the title of Advisory Opinion 91-70 and from its first sentence, the Advisory Opinion would only apply, if it applies at all, to *depositors*.[6] Petitioner has presupposed its "depositor" status, despite the fact that the Fifth Circuit correctly found that Petitioner was *not* a depositor. *City of Arlington*, 963 F.2d at 81. Petitioner is in the insupportable position of claiming the protections afforded a depositor when, in the

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[6] Advisory Opinions are not FDIC policy. An Advisory Opinion is nothing more than the statement of one staff attorney and is not binding upon the FDIC. *See* Prefatory Note to Advisory Opinions (Addendum A).

first instance, it has failed to meet the threshold test establishing depositor status.

Petitioner does not address the fact that Advisory Opinion 91-70 applies only to depositors; instead, it glosses over this distinction. It would have this Court assume that Petitioner is entitled to the full protections afforded a depositor. However, it is undisputed that those protections do not extend to non-depositors, such as Petitioner; indeed, to extend such protections to non-depositors like Petitioner "would have Gibraltar assume liability for every depositor account transaction made by First Texas, including those which resulted in the closure and deactivation of deposit accounts." *Id.* at 83. Such a construction of the Acquisition Agreement between First Gibraltar and the FSLIC is unworkable, illogical and contrary to the Nation's banking scheme.

Petitioner's focus on the second paragraph of the Advisory Opinion, which provides that "money belonging to a *depositor* that is *tendered* to, and received by, an insured institution for deposit . . . should be treated as a deposit in fact," is self-defeating. *See* Advisory Opinion 91-70 (emphasis supplied). Indeed, Petitioner has admitted that it never deposited money with First Texas, and thus it cannot claim that it tendered funds to First Gibraltar as contemplated in the quoted language in Advisory Opinion 91-70.

Even if Advisory Opinion 91-70 was somehow construed to apply to non-depositors such as Petitioner, the Advisory Opinion does not provide for claims against an acquiring institution, such as First Gibraltar. Rather, the Advisory Opinion contemplates the filing of claims against the insurer. *See* Advisory Opinion 91-70 (aggrieved depositors may "include the amount of the deficiency in a claim for *deposit insurance*"). It does not state or otherwise imply that such a depositor may attempt to collect from the acquiring institution, as Petitioner would have this Court hold. It certainly does not support the specific performance of an escrow agreement entered into by a failed thrift almost eighteen months before insolvency and failure. To the

contrary, the Advisory Opinion is clear that an alleged deposit liability is handled as an insurance claim. *Id.* ("the claim will be allowed only in the amount recognized by the insurer. . .") (Petition at page 63a).

Moreover, the Advisory Opinion provides that claims in excess of the insured amount are asserted against the receivership estate of the failed institution. If there is a deficiency in the claim for deposit insurance:

> [t]his would leave the FDIC, as (insurer and) subrogee, to seek reimbursement for the insurance payment *from the receivership*, which presumably would ordinarily have a bond claim based on the misconduct of the failed institution's employee. *The deposit holder would have no need or right to file a claim against the receiver except for the portion of the deposit account adjusted, for the deficiency, in excess of the insured amount, if any.*

Id. (emphasis supplied) (Petition at 61a). The Advisory Opinion refers to the assertion of claims against the insurance fund and/or the receivership estate of the failed institution, *not an acquiring institution that bargained for and received a limited and specific set of assets and liabilities.*

Advisory Opinion 91-70 does nothing more than provide *depositors* with certain rights and protections against the *insurer* or perhaps, the *receiver* of the failed institution. Contrary to Petitioner's strained analysis, the Advisory Opinion does not magically turn Petitioner into a depositor; nor does it give a non-depositor, such as Petitioner, any rights against the acquiring institution. It is clear that the Advisory Opinion does not apply on any level to the facts of this case and is not in conflict with the Fifth Circuit Opinion.

Advisory Opinion 90-44, also cited by Petitioner, is equally inapplicable to this case. Advisory Opinion 90-44 provides that if a depositor demonstrates that a depository institution was directed to identify the depositor as the trustee for a trust but instead merely placed the name of the depositor on the signature

card, the FDIC would treat the deposit account records of the insured institution as having indicated the existence of the trust. The principle applied in this Advisory Opinion assumes that the depositor/trustee is in some capacity identified in the deposit account records. However, in the instant case, the deposit account records do not refer to Petitioner in any manner. Because Petitioner's interest is not apparent from the account records, Advisory Opinion 90-44 is inapplicable to this case. As was also true with the case law and the deposit insurance regulations, the Advisory Opinions do not present a conflict of authority, and they do not provide a basis for granting a petition for writ of certiorari.[7]

III.

THE OPINION DOES NOT HAVE THE EFFECT OF PERMITTING AN INSTITUTION TO DEPRIVE AN INSURED DEPOSITOR OF ITS RIGHTS

Petitioner has improperly described the anatomy of the Fifth Circuit's decision by stating that "[a]t its heart, the Fifth Circuit's decision below stands for the unprecedented proposition that once a deposit relationship has been established, a financial institution may by its unilateral acts of omission or commission deprive the insured depositor of his status as such." Petition at 17-18. This is nothing more than a "strawman" argument, a type of artificial parade of horrors, which was created for the purposes of distorting the actual holding of the Fifth Circuit

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[7] Petitioner cites certain dictum in *Abdulla Fouad & Sons v. FDIC*, 898 F.2d 482 (5th Cir. 1990), which is consistent with the principles applied in Advisory Opinion 90-44. The account in *Abdulla Fouad* was styled "Allied International/General Account Allied International Sales Corp." 898 F.2d at 483. The court implies in the dictum relied upon by Petitioner that Fouad may have recovered had the bank "erred in recording Allied's *capacity* on the deposit cards when Allied opened the account." *Id.* at 485. However, the court never strays from the threshold requirement that a party's interest, even in the wrong capacity, must appear on the deposit account records.

and of attempting to appear "writ worthy." Contrary to Petitioner's representations to this Court, the Fifth Circuit Opinion does not even purport to address the case of a financial institution depriving the insured depositor of its depositor status. In fact, even Petitioner has conceded that it is implying such a holding into the Opinion. *See* Petition at 18 (referring to the "proposition *suggested* by the Fifth Circuit") (emphasis supplied); *see also* Petition at 23 ("the Fifth Circuit's *implicit* decision") (emphasis supplied).

Despite Petitioner's protestations, the Fifth Circuit Opinion is consistent with the deposit insurance scheme, the deposit insurance enactments, the underlying regulations and federal case law. The Fifth Circuit has not held, nor has it implied, that the alleged wrongful acts of bank personnel will deprive a *depositor* of its status as a *depositor*. Rather, the Fifth Circuit Opinion simply holds that the alleged wrongful acts of officers of a failed institution do not expand the scope of liabilities assumed by First Gibraltar and do not modify or alter the terms of the Acquisition Agreement.

IV.

THE D'OENCH DOCTRINE BARS PETITIONER'S CLAIMS

The *D'Oench, Duhme*[8] doctrine independently confirms that the decision of the Fifth Circuit is proper. As this Court is well aware, the *D'Oench* doctrine is a broad-based rule of estoppel which has been applied expansively in recent years in order to effectuate critical federal policies. *Bowen v. FDIC*, 915 F.2d 1013, 1015 (5th Cir. 1990). The applicable test for establishing whether *D'Oench* applies is whether a party "lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled." *Buchanan v. FSLIC*, 935 F.2d 83 (5th Cir. 1991). The failure of

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[8] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

Petitioner to assure proper documentation of the transaction with First Texas made the First Texas records misleading to bank examiners. A bank examiner, looking at the records of First Texas on the date of insolvency, would have seen that the Account securing the Shady Valley loan was offset against the loan without any reference to any interest other than First Texas and Shady Valley. Because the examiner could not have been aware of the unrecorded side agreement upon which Petitioner relies, the examiner could not have known that the Account was "intended" to be "Escrow Account-Arlington." Unaware of these various other undisclosed agreements, the bank examiner would have been misled by the records. Such is the stuff of *D'Oench*.

Additionally, the findings of fact of the district court bring this case squarely under the reach of the doctrine and bar Petitioner's claims. The district court found that:

> [T]he *intent of the parties* was that the Account would be the "Escrow Account-Arlington" that was contemplated by the escrow agreement; and, once the agreement was made, *the parties considered* that the Account was the "Escrow Account-Arlington. . . ." In other words, the placement by First Texas of $2,100,000.00 in a separate account was accomplished by allowing the Account to remain in existence at First Texas, and *all parties viewed the Account to be the "Escrow Account-Arlington," and as satisfying the requirements of the escrow agreement*. . . . At or about the time plaintiff executed the escrow agreement, an officer of First Texas *told* the attorney for plaintiff that the account contemplated by the escrow agreement was established.

[ROA V 9, P 2242-43] (emphasis supplied). The uncontroverted evidence demonstrates that the "intent of the parties" was entirely oral. *No writing memorializes this alleged "intent"*, or the fact that "all parties viewed the Account to be the "Escrow Account-Arlington" and "as satisfying the requirements of the

escrow agreement." The Escrow Letter Agreement does not refer to the pre-existing Account. The Account does not refer to the Escrow Letter Agreement or to any interest of Petitioner. To the contrary, the Account signature card shows that the deposit was held by First Texas as trustee for Shady Valley. [ROA V 4, P 866]. Moreover, the Shady Valley loan documents demonstrate that the Account was held as security for the loan. [ROA V 4, P 887]. The bank examiner could not have pieced all of this together, and thus, the *D'Oench* principles are clearly brought into play. *See Buchanan*, 935 F.2d at 86, n.5. ("[p]romoting the government's ability to rely upon the financial institution's records is the prime purpose of *D'Oench Duhme* doctrine"). The well-established *D'Oench* doctrine is clearly applicable to the facts of this case and warrants denial of the writ.

CONCLUSION

The Fifth Circuit fully considered and correctly decided the issues before it. The Opinion below turns on its own specific facts, and in addition, is in keeping with well-established authority regarding the scope of liability of acquiring banks and the conclusiveness of deposit account records. Moreover, policy considerations support the decision below. In sum, there is no justification for this Court to review the Fifth Circuit Opinion issued on June 17, 1992, and consequently, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles M. Moore, a member of the Bar of the Supreme Court of the United States and counsel of record for Respondent, First Gibraltar Bank, F.S.B., hereby certify that on November __, 1992, pursuant to Supreme Court Rule 33, I served three copies of foregoing Brief in Opposition to Petition for Writ of Certiorari on each of the parties as follows:

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All parties required to be served have been served.

/s/ CHARLES M. MOORE
Charles M. Moore

ADDENDUM A

FDIC ADVISORY STAFF OPINIONS

Note: As a public service, and in an effort to help bankers, lawyers, and others having an interest in federal banking law to better understand the statutes and regulations administered by the Federal Deposit Insurance Corporation (including the FDIC's rules for determining deposit insurance coverage), the FDIC's legal staff has selected for publication a representative sampling of FDIC staff legal advisory opinions, interpretative letters, and general informational letters. The FDIC has not attempted to identify or publish all, or even most, letters on a particular subject, and there may well be other letters that have not been selected for publication. Similarly, the FDIC does not plan to review letters, once they have been published, for the purpose of flagging or removing those that may have become outdated, superseded or discredited, or that may have been revised, modified, revoked or suspended.

The letters express the views and opinions of individual FDIC staff lawyers and are not binding on the FDIC, its Board of Directors, or any board member; any representation to the contrary is expressly disclaimed. The letters should only be considered advisory in nature, and the reader bears the responsibility for relying on them.

The FDIC has deleted from the letters certain personal, confidential, or identifying information (*e.g.*, names and addresses of persons and organizations, names of banks and bank customers, amounts of deposit, financial data, etc.). Deletions are marked with asterisks.

No. 92-653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

FIRST GIBRALTAR BANK, F.S.B.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Charles M. Moore, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Respondent, First Gibraltar Bank, F.S.B., hereby certify that on November 11, 1992, pursuant to Supreme Court Rules 29.5 and 33, I served three (3) copies of the accompanying Brief in Opposition to Petition for a Writ of Certiorari by placing the Briefs in an envelope, first class postage prepaid, properly addressed to each of the following:

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